United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-1403

United States Court of Appeals
For the Second Circuit

B
P/s

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIE ALTER,

Defendant-Appellant.

Appeal from an Order of Judgment of the United States District Court, Southern District of New York.

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

WILLIE ALTER,

Defendant-Appellant.

PRELIMINARY STATEMENT

The appellant has appealed to this Court from a final order or judgment whereby he was convicted for a criminal contempt under Rule 42 of the Federal Rules of Criminal Procedure before the Honorable Whitman Knapp, a Judge of the United States District Court, Southern District of New York. As a consequence of the conviction he was sentenced to a maximum term of six months on September 29, 1977. Application was made to this Court for a stay of the execution of the six month sentence. Since the proceedings were brief and the record not extensive, appellant has requested that this appeal be expedited and heard with the said application for a stay.

THE ISSUES AND QUESTIONS INVOLVED

1. Should the prosecution have been directed or alternatively, should the prosecution have had all the evidence, if any, the authorities had regarding the appellant segregated and shown to the Court as a condition to the granting of "immunity" as to the appellant under 18 U.S.C. 6001, 6002(1)?

2. Was "immunity" conferred upon Alter coextensive with the 5th Amendment to the Federal Constitution insofar as it guarantees the right of silence?

3. Was the prosecution's response as to whether the appellant was subjected to electronic surveillance sufficient?

4. Should the Court have cited the appellant for civil contempt rather than criminal contempt under 28 U.S.C 1826(a)(2)?

5. Was the sentence of six months, the maximum allowable under the circumstances of this case, excessive and should the said sentence be reduced or favorably modified?

STATEMENT OF THE CASE AGAINST THE APPELLANT

THE FACTS

At the time of the events herein, there was an on-going trial before the Honorable Whitman Knapp, with a jury. The case was entitled U.S. v. Salerno.

Salerno was being tried for a willful failure to report his income. The prosecution for its case called Alter as a witness (810, 811)*.

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*This refers to the pagination of the minutes of that session of the trial where Alter appeared as a witness and who was ultimately held for contempt.

The government sought to have Alter testify as to two checks he gave to Salerno. On the back of the checks there was an inscription or endorsement designated "loan" (811).

It appears that the government wanted to establish that the loan was repaid by Salerno (811).

The government also wanted to question Alter as to whether Salerno conducted an illegal gambling operation (811).

Alter's then attorney, Robert Blossner, informed the prosecutor that he believed that Alter would not testify as to the gambling area (811).

Accordingly, the government sought a hearing outside the presence of the trial jury (812).

The Court commented or inquired as to the purpose of the sought evidence, if any, in regard to the area of illegal gambling. It was apparently established that Salerno was a gambler, a "race track" gambler by his own admissions (812, 813).

After further colloquoy as to why the government sought to establish that Salerno was involved in the illegal phase of gambling, the Court stated:

> "The Court: It seems to me that he is entitled to charge that if his intent was purely of a deduction and illegal gambling and not to devote the income tax, then you haven't made your case out."

"Mr. Siffert: No, Your Honor, because the government's position would be that his intent to evade deduction has to do with everything."

"The Court: That is your position but if the jury finds he wasn't thinking about income tax but was thinking about gambling, then they should acquit him."

"Mr. Siffert: We will take our chances."

"The Court: I don't see why it is relevant to show he had other intents. All that it does it seems to me is cut against your proof. don't see why it is relevant." (813, 814).

Counsel for Salerno was willing to stipulate in the government's behalf as to the transactions underlying the two checks (814, 815, 820).

The appellant then in the presence of his then counsel, was sworn as a witness (951, 952). He was asked whether he was a bookmaker and the appellant asserted his right of silence (952).

The government applied for a grant of immunity and the Court granted the application (953).

The Court explained the nature of the "immunity" conferred upon the appellant (953). In explaining it the Court stated that:

"The Court: What I have done in terms of the government request is to sign an order which confers immunity upon you with respect to anything you may say in response to appropriate questions. That means, of course, that the immunity is limited to good faith answers to questions. He can't ask you your name, then confess to all the crimes you have committed under the grant of immunity. It means that

> this testimony can't be used against you in any criminal proceeding or, as far as I know, any other proceeding, nor can the government get any information from what you say and go and see if they can get other evidence."
>
> "On the other hand, if they already know about the crime, this testimony doesn't stop them from evidence they have previously."
>
> "The illustration I give on that issue is you remember when Mr. Ruby shot Oswald on national television. If after that he had been asked under immunity, that wouldn't stop the government from going ahead and prosecuting him because everybody knew about it." (953, 954).

At Alter's counsel's request, the matter was then put over to the following day. However the government made known to seek a conviction for criminal contempt if the appellant refused to testify. The government admitted it would seek a commitment for "civil contempt" because then Alter could "purge himself" (956). The government preferred a commitment for criminal contempt however because the Court could then sentence Alter "up to six months" (956).

It next became manifest through arguments of Alter's then counsel that originally counsel after talking to the government's attorney thought that all the government sought to establish from Alter was the loan transactions represented by the checks. Former counsel then actually allowed Alter to confer with the prosecutor (957, 958).

On a Sunday following that interview, the prosecutor told counsel that Alter would be examined as to other matters (958). The Court commented that asking Alter whether he was a "bookmaker" was to lay a foundation as to whether Salerno was engaged in illegal gambling. The point the Court made was that if Alter were a bookmaker, he would know about Salerno's alleged illegal gambling activities (959).

There was a statement by the prosecutor that he and Alter's then counsel reached a "kind of unspoken understanding" (960). However the issue as to the source of Salerno's income was not then resolved by the prosecutor (960, 961).

Government counsel made known that it proposed to ask Alter whether he was an underling of Salerno in an illegal gambling enterprise (962, 963).** Alter's case was then put over to the next day which was September 29, 1977 (968, 972). On the adjourned date, September 29, 1977, Alter appeared with other counsel (973, 974). Other counsel informed the Court that Alter wanted to be represented by Harold Price Fahringer who then was engaged in Ohio in State v. Flint, an appeal. Request was made and denied to put the matter over for a few days so that Harold Price Fahringer could appear (974, 975).

** Salerno with others has been indicted in the Southern District for a conspiracy under 18 U.S.C. 371 to violate the federal gambling statute 18 U.S.C. 1955 as well as the substantive crime under 18 U.S.C. 1955.

Counsel then offered the basis for Alter's resistance to testify (975).

These issues were illegal electronic surveillance (975, 977); whether full immunity in practicality could be conferred (981, 983); whether the "immunity" conferred was co-extensive with the demands of the privilege against self-incrimination (985).

At that phase, counsel's arguments were held to be fruitless and Alter was questioned (987).

Upon being questioned by the Court, Alter was asked as to the basis of his refusal (988).

Robert Blossner, the predecessor attorney who was also present, told the Court that he had advised Alter the previous evening that if Alter were to answer the question affirmatively as to whether he was a bookmaker, it would be an invitation to a prosecution and that Alter should consider that (988, 989).

The Court after further colloquy stated:

> "The Court: Everybody in the world knows this man is a bookmaker. How would his saying it in this Courtroom invite anybody to do anything?
>
> "You want to make a serious statement on the record?" (989)

After a further statement by then counsel as to what he told his client, the Court stated:

> "The Court: If you want the record to show you have made such an assinine statement to him, it will show." (989, 990).

In effect, Alter denied being a bookmaker (990).

After being questioned by the Court Alter made known that he was apprehensive about "taxes" (991).

The appellant was also asked by the prosecutor as to whether he knew of Salerno's illegal gambling and about the checks (991, 992).

Alter refused to answer and was convicted for criminal contempt (994).

Present counsel then further argued that the Court should take recourse to civil contempt (994, 995). That the matter be referred to another judge (995).

The proceedings then were all but terminated (1000).

Alter then made known that he could testify as to whether Salerno was engaged in an illegal gambling operation; but he was reluctant to respond as to his "background" and expressed apprehension that he could be convicted later on (1002).

The Court indicated that Salerno's trial counsel Roy Cohen could ask them some questions about how he has any knowledge as to Salerno's alleged gambling activities (1002).

Salerno's trial counsel, Roy Cohen, then offered to discuss the matter with the government attorney so that all the parties could be satisfied in regard to the proposed examination of Alter (1003, 1004, 1005).

The Court then explained to the appellant the relevancy of the proposed questions proferred by the government counsel (1009).

POINT I

THERE SHOULD HAVE BEEN GOVERNMENT DISCLOSURE TO THE COURT AS TO WHAT EVIDENCE INDEPENDENT OF ANY ANSWERS ALTER WOULD GIVE OR WAS EXPECTED TO GIVE, SO THAT ALTER WOULD KNOW IF HE WERE LATER PROSECUTED THAT HIS RESPONSES WERE NOT RELIED UPON BY THE FUTURE PROSECUTING AUTHORITIES.

Kastigar v. U.S., 406 U.S. 441 (Judge Marshall dissenting) which sustained the validity of 18 U.S.C. 6001, 6001 put upon the prosecuting authorities the duty to establish affirmatively rather than negatively, that any future prosecution was founded on evidence independent of a witness' compelled and immunized testimony (406 U.S. 460, 461).

Thus this generated the concept that the holding in Kastigar be implemented factually before a witness render the compelled responses; see Goldberg v. U.S., 472 F. 2d 513, (Cir. 2d, 1973), concurring opinion of Judge Oakes, footnote 5, at page 516, stating that:

> "Without endorsing everything said in Notes Standards for Exclusion in Immunity Cases... 82 Yale Law Journal 171, 181-188 (1972) we would think that prosecutors both in their own interests and in fairness to the defendant, would do well to consider the certification of evidence available prior to the compulsion of testimony proposed at page 182..."

See also 67 Journal of Criminal Law and Criminology No. 2, an article authored by Richard A. Thornburgh, an Assistant Attorney General of the United States, Criminal Division, who stated on page 162 that he substantially agreed with the article referred to in the Yale Law Journal although he did

not wholly agree.

Emperically, the Courts have experience where a witness before a grand jury who was given immunity was subsequently indicted with committing a crime that involved the subject matter of the compelled testimony. See U.S. v. Catalano, (Dellacroce), 491 F 2d 268 (Cir. 2d, 1974), at page 272, cert. denied 419 U.S. 825; U.S. v. Names, (Cir. 2d, May 16, 1977) 21 Criminal Law Reporter, 2197.

In this case, unlike Kastigar, and the cases cited above, the testimony the prosecutor sought to compel from the appellant was at an open trial. The other cases dealt with grand jury testimony. Put another way, this testimony was to be given before a trial jury and not only a trial jury but in an open courtroom with spectators. Finally, the appellant would have been subjected to cross examination that probably would be penetrating.

Consequently, the "burden" established in Kastigar extending to a prosecutor would not in practicality or from the point of view of empericism, insulate the compelled testimony from other law enforcement officials (other than the prosecutor). Subtle use could be made of this information and no prosecutor would be conscious of the use of the "immunized" testimony. The leads and the products from the subtle exploitation of the evidence would not be capable of proof.

Furthermore, the statement of the Court below may have lead to a watering down of the "immunity". It may be recalled that the Court made known or indicated that it was apparent that Alter was a "bookmaker" (988, 990). Yet there was no evidence of this. Alter denied this (990). Furthermore, Alter possibly incriminated himself by stating that he was worried about "taxes" (991).

The Court earlier told Alter that immunity was limited to "good faith" responses. Appellant understands this to mean that Alter could not blurt out irrelevancies and later claim immunity. See Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972), at page 476. Thus, Alter was put in a position where he might later have to establish "good faith" if he were later prosecuted. It is submitted that the privilege against self-accusation would then be further violated. Alter would be in a position where he would have to explain the "good faith" by admitting crimes and that the admissions were therefore responsive. That he honestly believed that if his answers involved other crimes, his answers were relevant and not an invitation for surplus immunity. Furthermore, there is no standard of how "good faith" would have to be established. That is, would it have to be established beyond a fair preponderance of the evidence? Clear and convincing evidence, or beyond a reasonable doubt?

Viewing the actual situation attendant to this case, Alter was called as a witness at an open trial. He was thus in a dilemma when he would be cross examined by Salerno's attorney. Whether his answers would be later deemed responsive was problematical. The cross examination could lead to a conflict between Alter's right not to incriminate himself and Salerno's right to confrontation, that is cross examination (6th Amendment to the Federal Constitution).

As stated in 48 Washington Law Review, 711, et seq. (1973) at pages 723-724:

> "...Second. The operative effect of the use and derivative use immunity statute approved in Kastigar will result in an erosion of the Fifth Amendment privilege against self-incrimination, particularly since present rules for discovery in the Federal Rules of Criminal Procedure deny an objecting defendant access to the prosecutor's investigatory files, thereby eliminating the only realistic opportunity to contest the government's assertion that its evidence was gained without taint."

As noted in 1973-1974 Annual Survey of American Law, (N.Y. University Law School), page 342, at pages 358-359:

> "One way for the Government to prove that its evidence was independently obtained is to certify its evidence against the accused before he testifies under the grant of immunity. Special Prosecutor Archibald Cox utilized this technique in the preparation of the Government's case against alleged Watergate conspirator John Dean. Prior to Dean's testimony under immunity before the Senate Select Committee on Presidential Campaign Activities, Cox filed with the District Court a sealed packet containing evidence he would later use to prosecute Dean. This prior certification

technique, however, does not guard absolutely against the Government's derivative use of immunized testimony for such purposes as planning trial strategy, evaluating the certified evidence and planning cross-examination of the defendant should he elect to testify..."

POINT IA

18 U.S.C. 6002 IS IN VIOLATION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AS APPLIED TO THE FACTS OF THIS CASE, AND FURTHERMORE, HAS A "CHILLING" EFFECT ON THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

Coalescing with the argument above, it is respectfully suggested that the holding in Kastigar validated 18 U.S.C. 6002 facially. It is however further respectfully submitted that as applied to the facts here, the statute is in violation of the 5th Amendment right not to be a self-accuser.

Notice of course is taken of Judge Marshall's dissent in Kastigar, at page 467 of 406 U.S.

This issue has to be raised because it may be that as time goes on, the safeguard in Kastigar may not effectively operate in practice and Justice Marshall's apprehensions would unfortunately be realized. See 48 Washington Law Review, 711, supra, at pages 719-723; 58 Virginia Law Review, 1099, (1972), at pages 1113, 1114; 27 Southwestern Law Journal 517 (1973), at pages 523-524 where it was stated in part that:

> "...If it becomes difficult or impossible to prove that subsequent convictions...were not based on testimony obtained under grants of immunity, the result may be a return to the standard of complete transactional immunity; ... While Kastigar has ostensibly established the use and derivative use standard, perhaps it will be seen that this standard is too harsh or too difficult to follow and the real standard remains a complete, transactional immunity. A future case might so decide."

Furthermore, there is no standard of proof as to how a future prosecuting authority can establish an independent source of the evidence upon which such prosecution is founded. See 19 Villanova Law Review, 517 (1974) at pages 485, 486.

It is further respectfully submitted, that the validation of 18 U.S.C. 6001, et seq. or its application to the facts of this case or similar cases, has a "chilling" effect on the assertion of the privilege against self-incrimination as provided for in the 5th Amendment to the Federal Constituiton. It would appear to be recognized that Constitutional violations may arise from a deterrent or "freezing" effect of laws that tend to a direct prohibition against the exercise of a basic fundamental right such as contained in the 5th Amendment to the Federal Constitution. See Baird v. State Bar of Arizona, 401 U.S. 1; Keyishian v. Board of Regents, 385 U.S. 589; Lamont v. Postmaster General, 381 U.S. 301; Baggett v. Bullit, 377 U.S. 360.

Recognizing that the exclusionary rule is judicially created, at least as to the 4th Amendment to the Federal Constitution, it is respectfully submitted that the 5th Amendment right is an exclusionary rule per se and not judicially created to implement a constitutional right. See concurring opinion of Mr.Justice Black in Mapp v. Ohio, 367 U.S. 643, at page 1093. Hence,it is respectfully suggested that the holding in Kastigar which adopted the exclusionary rule be reconsidered. By adopting the use of this rule, the way is open to enable avoidance of the guarantee of the 5th Amendment by way of attenuation of inevitable discovery. Furthermore, it is respectfully contended that the 5th Amendment right against self-incrimination is a "complex of values" that also involves the right of privacy or the right to be left alone not in the narrow sense of effects o property but in the wider sense of "privacy". As has been expressed by Mr. Justice Powell in Couch v. U.S., 409 U.S. 322 (1973) at page 327:

> "The importance of preserving inviolate the privilege against compulsory self-incrimination has often been stated by this Court and need not be elaborated... By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation. Historically, the privilege sprang from an abhorrence of governmental assault against a single individual accused of crime and a temptation on the part of the state to resort to the expedient of compelling incriminating evidence from one's own mouth..."

See also The Supreme Court Review, 1967 (University of Chicago Law School) page 193, et seq. and 206 et seq.

POINT II

THE COURT BELOW SHOULD HAVE DIRECTED A DISCLOSURE OF ANY WARRANTS AND SUPPORTING PAPERS THEREFOR ALLOWING THE USE OF ELECTRONIC SURVEILLANCE AND SHOULD HAVE PERMITTED A DEFENSE OF ELECTRONIC SURVEILLANCE TO THE CONTEMPT CHARGE.

Counsel raised the issue of illegal electronic surveillance as a possible defense to the charges of contempt; see Gelbard v. U.S., 408 U.S. 41 (1972). Upon being questioned by the Court as to this counsel pointed out the secret nature of electronic surveillance and that appellant was never served with a notice that he was subjected to electronic surveillance. See U.S. v. Donovan, 50 L. Ed. 2d 652, 1977.

The government attorney then stated that at one of the places Alter frequented, there was electronic surveillance (977). Government counsel stated he spoke to a federal agent and that appellant's name "came up on tape" but the authorities were unable to say whether "Alter personally showed up" (977).

Government counsel also stated that was the "full extent" of his knowledge as to any electronic surveillance that "may or may not" involve the appellant.

Alter's counsel argued for a disclosure under 18 U.S.C. 3504 and government counsel referred to existing electronic surveillance orders that on a prior occasion were held to be facially valid by other judges in the Southern District (978, 979).

It is respectfully submitted that the requirements of 18 U.S.C. 3504 were not met.

Firstly, what was involved here was not wire tapping but, it is believed, the placing of a device in an apartment or room or other private locale to "seize" voices. The record bears out that Alter knew Salerno and counsel pointed out that Alter frequented places that were subjected to electronic suveillance. There does not appear any denial of these facts. Due to the intrusive and secret nature of electronic surveillance and under the circumstances of this case, it would be impossible for anybody to ascertain whether there was a defense of illegal electronic surveillance to a contempt charge or to otherwise raise the issue that the questioning if not the presence of a person before a grand jury or at trial, was or wasn't a product of illegal electronic surveillance.

This Court has mandated that at the very minimum a witness has a right to raise the issue of electronic surveillance and that the government has to respond under 18 U.S.C. 3504. See In Re Millow, 529 F. 2d 770 (Cir. 2d, 1976); Re Persico, 491 F. 2d 1156 (Cir. 2d, 1974); Re Buscaglia, 518 F. 2d 77 (Cir. 2d, 1975). Those cases dealt with this issue in the

context of a grand jury proceeding and recognized, that the governmental response under 18 U.S.C. 3504 was sufficient, this Court having in mind that the grand jury was conducting an investigation and that expediency was required.

However, Alter was not charged with being a civil contemnor. He faced a criminal charge and is presently serving a sentence for being convicted of criminal contempt. Hence, it would seem that Gelbard v. U.S., 408 U.S. 41 (1972) is clearly applicable. That case held that a defense to a contempt proceeding or action can be based on illegal electronic surveillance. The concurring opinion of Mr. Justice White at page 69 of 408 U.S. held that the government in producing a court order may comply with the majority ruling in Gelbard and that a witness was not entitled to a "full-blown suppression hearing".

However, in this case it is submitted that the government response was completely inadequate. While Alter was faulted for not raising a more detailed claim as to electronic surveillance, it is submitted, that the one party that should have known whether Alter's voice "was seized" was the government. And yet government counsel could not enlighten the Court any more than Alter's counsel. Government counsel stated that this was ascertained that very morning at "9:15" (977).

It is respectfully submitted that the government attorney had ample time to make the necessary arrangements to procure authorization from the Department of Justice to make an application for immunity which of course was granted. Yet the government appeared to know very little more than counsel did in regard to the issue of electronic surveillance.

The claim of the government that other judges ruled on the facial validity of electronic surveillance warrants, could not obviate the claim or defense of the appellant. Firstly Alter was not involved in those proceedings; secondly, those proceedings may have involved grand jury investigations. This was a proceeding to hold Alter in criminal contempt. There was no disclosure of the warrants or the applications therefor, in regard to Alter. Hence there was no discovery so that counsel could ascertain whether Alter had a claim of electronic surveillance. It is respectfully submitted further that "facial sufficiency" of a warrant is not the sole standard, see 18 U.S.C. 2518 (10)(a).

Issues of probable cause, sealing requirements, minimization and the identity of the official who authorized the application for electronic surveillance, all go into the issue of legal electronic surveillance.

BEST COPY AVAILABLE

In People v. Mulligan, 40 A.D. 2d 165, 338 N.Y.S. 2d 488, at pages 491-492 it was recognized that while a grand jury witness cannot impede the proceedings by an application to suppress evidence gained from electronic surveillance, that person, a defendant in a criminal action based on contempt, can raise the issue.

POINT III

THE COURT SHOULD HAVE CITED ALTER FOR CIVIL CONTEMPT RATHER THAN CRIMINAL CONTEMPT.

It is respectfully submitted that the Court should have resorted to civil contempt under 28 U.S.C. 1826(a)(1). The Court declined this. The Court assigned as a reason that a confinement for civil contempt would be at a minimum (995, 996). The Court also stated that if appellant decided to cooperate the Court would consider that.

It is respectfully submitted that this leads to the inference that if after Alter were convicted and incarcerated, he decided to cooperate, Alter could apply for a reduction of the penalty. This, it would appear, would be similar to civil contempt except that Alter would have a criminal conviction.

In Shillatani v. U.S. 384 U.S. 364 (1966) it was stated at pages 371-372, footnote 9, that:

> "...This doctrine further requires that the trial judge first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should resort to criminal sanctions only if after he determined, for a good reason, that the civil remedy would be inappropriate."

POINT IV:
THE SENTENCE IMPOSED WAS EXCESSIVE AND SHOULD BE FAVORABLY MODIFIED.

The appellant was given the maximum sentence allowable, namely six (6) months. This it is submitted was the maximum allowable because there was no jury trial. 18 U.S.C. 401(3) and Rule 42 of the Federal Rules of Criminal Procedure governing criminal contempts contain no direction, legislative or otherwise, as to the limits of a sentence.

However it is submitted there was but one refusal by the appellant. While the appellant was willing to answer some questions namely about the checks, his reluctance was manifested as to the gambling issue. To answer some questions and refuse the others would have been improper. His answer or answers could have been construed as a waiver of the privilege against self-incrimination and the other claims he made. In other words, a witness cannot select which questions to answer or not to answer.

It is therefore put that there was just a single refusal and that the sentence should be favorably modified and reduced.

Alter has been in jail since September 29, 1977. He will be in jail at the time this application for a stay and grounds for review are put to the Court. In Yates v. U.S., 355 U.S. 66 (1957) the petitioner after being held for civil contempt was convicted of criminal contempt. It appeared the witness, a defendant in a criminal case who testified, refused to answer 11 questions put to the petitioner by the prosecutor. The Court firstly held at page 72 that the contempt was criminal and not civil. The Court then stated on page 72 that:

> "A witness, of course, cannot pick and choose the questions to which an answer will be given. ..." (Omitting internal quotations).

On pages 73-74 it was stated that:

> "Having once carved out an area of refusal, petitioner remained within its boundaries in all her subsequent refusals. ..."

In other words, the Court held that a prosecutor could not multiply contempts by multiplying the questions and that a refusal to answer questions in an area is but one refusal.

The Court then remanded the matter for resentencing. In this connection it was stated in part on pages 75-76 that:

"While the sentences imposed were concurrent, it may be that the Court's judgment as to the proper penalty was affected by the view that petitioner had committed 11 separate contempts. In addition, petitioner has now served a total of over 70 days in jail awaiting final disposition of the several proceedings against her... In this regard, petitioner's understandable reluctance to be an informer, although legally insufficient to explain her refusals to answer, is a factor, as is her apparently curteous demeanor and the fact that her refusals seem to have had no perceptical effect on the outcome of the trial. All of this points up the necessity we think, of having the trial judge reconsider the sentence in the cool reflection of the subsequent events."

In view of this, counsel does bring to the attention of the Court that Salerno's trial ended in a deadlocked jury. However, it is submitted that there appears to be no evidence that Alter's reluctance in any way contributed to that factor.

CONCLUSION:

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED, OR ALTERNATIVELY, THE SENTENCE REDUCED OR FAVORABLY MODIFIED.

Respectfully submitted,

HAROLD PRICE FAHRINGER
Attorney for Appellant

ARNOLD E. WALLACH
Of Counsel

FAHRINGER (WALLACH)

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 25 day of Oct. ,1977 at No. 1 St. Andrews Pl., NYC

deponent servied the within Brief upon U.S. Atty. So. Dist. of NY

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
25 day of Oct. 1977.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

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